

COMMISSION ON JUDICIAL PERFORMANCE
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JUDICIAL PERFORMANCE COMMISSION ISSUES
PUBLIC ADMONISHMENT OF JUDGE DEREK G. JOHNSON

The Commission on Judicial Performance has publicly admonished Judge Derek G. Johnson of the Orange County Superior Court.

The commission determined that Judge Johnson should be publicly admonished for remarks he made while sentencing a defendant convicted of rape and other sexual assault offenses. The comments created the impression that the judge was not impartial in cases involving rape without serious bodily injury showing resistance by the victim. The commission found that the judge's comments were contrary to canon 2A of the Code of Judicial Ethics, which requires a judge to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and canon 3B(5), which requires a judge to perform judicial duties without bias or prejudice, and provides that a judge shall not, in the performance of judicial duties, engage in speech or other conduct that would reasonably be perceived as bias or prejudice.

After stating that he would sentence the defendant to the midterm of six years, rather than 16 years as requested by the prosecutor, the judge stated: "I'm not a gynecologist, but I can tell you something: If someone doesn't want to have sexual intercourse, the body shuts down. The body will not permit that to happen unless a lot of damage is inflicted, and we heard nothing about that in this case. That tells me that the victim in this case, although she wasn't necessarily willing, she didn't put up a fight. And to treat this case like the rape cases that we all hear about is an insult to victims of rape. I think it's an insult. I think it trivializes a rape." Later the judge stated: "I found this whole case to be a technical case. The rape is technical. The forced oral copulation is technical. It's more of a crim law test than a real live criminal case."

The commission found that the judge's comments suggested the judge was not impartial towards sexual assault victims who do not "put up a fight," by suggesting that they are not victims of a "real" crime. Further, the judge improperly relied on his own "expert opinion" concerning serious bodily injury showing resistance based on his experiences in the district attorney's office, rather than evidence before him. (See *Inquiry Concerning Judge Jose A. Velasquez* (2007) 49 Cal.4th CJP Supp. 175, 204; Public Admonishment of Judge Christine K. Moruza (2008) p. 7.) The judge's statement that the lack of physical damage showed that the victim "didn't put up a fight," along with his comment immediately thereafter that treating the case before him like other rape cases was "an insult to victims of rape" and "trivializes rape,"

reflected his own view that a victim must resist in order for there to be a “real” sexual assault — a view that is inconsistent with California law, which since 1980 has contained no requirement of proof that the victim of rape either resisted or was prevented from resisting because of threats. (See Pen. Code, § 261; *People v. Iniguez* (1994) 7 Cal.4th 847, 854-856.) In the commission’s view, the judge’s remarks reflected outdated, biased and insensitive views about sexual assault victims who do not “put up a fight.” Such comments cannot help but diminish public confidence and trust in the impartiality of the judiciary. In his response to the commission and at his appearance, Judge Johnson conceded his comments were inappropriate and apologized.

The decision noted that the remarks were made in June 2008 but did not come to the attention of the commission until May 2012.

Judge Johnson is represented by attorney Paul S. Meyer of Costa Mesa, California.

The public admonishment is available on the commission’s website at www.cjp.ca.gov (under “Pending Cases - Press Releases & Documents” and “Public Discipline & Decisions 1961 - Present”) and from the commission’s office.

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The commission is composed of three judges, two lawyers, and six public members. The Chairperson is Mr. Lawrence J. Simi of San Francisco, California. Commission member Hon. Frederick P. Horn was recused from this matter.

For further information about the Commission on Judicial Performance, see the commission’s website.